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No. 88-40

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief (at 15-40), we argued that the court of appeals erred in affirming the district court's authority to place restrictions on the IRS's use of material obtained pursuant to a valid summons—specifically, prohibiting its disclosure to other government agencies without further order of the court. This exercise of continuing supervision over the IRS's investigation exceeds the scope of the court's authority in a summons enforcement proceeding, which is to determine enforceability based upon whether a summons has been issued in good faith for a legitimate purpose authorized by Congress. Moreover, introducing this additional area of litigation into summons enforcement actions that are designed to be summary would interject unnecessary delays and threaten the effectiveness of IRS investigations. And the restriction is not justified

simply because it is intended to prevent IRS violations of Section 6103 of the Code. That Section itself already prohibits the IRS from unlawful disclosures, and Congress has established a mechanism for enforcing the prohibition. There is no warrant for converting a summary summons enforcement proceeding into an additional predisclosure remedy for potential Section 6103 violations—a remedy that was not contemplated by Congress and that is not available for confidential return information obtained by any means other than judicial enforcement of a summons.

Respondents' basic answer is that the court's authority to monitor the use of summoned material is inherent in its power to prevent its process from being abused and therefore need not be specifically conferred by Congress. Accordingly, they argue, the restriction imposed by the court below should not be viewed as a "restriction[ ] upon the IRS summons power," which this Court has repeatedly held "should be avoided absent unambiguous directions from Congress" (*Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 318 (1985)). Respondents further maintain that the summons enforcement court's continued supervision of the IRS's use of summoned material is essentially the same as a "protective order" issued by a court in discovery proceedings to protect the confidentiality of trade secrets. These contentions are flawed in several respects.

1. At the outset, we note that respondents attempt to trivialize this case by repeatedly suggesting (see, *e.g.*, Br. 26, 35-36, 37, 38, 41) that the issue here is simply whether the district court can prohibit the IRS from making illegal disclosures that are unrelated to its tax investigation. That unwarranted assumption of the illegality of every IRS action that is encompassed within the court's order begs the question, which is the procedural one of whether the court can require the IRS to obtain prior approval for actions to

be taken in the course of its investigation. The IRS in fact has no interest in making illegal disclosures and is not contesting the district court's order for the purpose of securing the right to make such disclosures; rather, it is objecting to the procedural hurdle erected by the district court that will unnecessarily hamper IRS investigations.

What respondents ignore is the fact that determining whether a particular disclosure is legal—for example, as necessary for investigative purposes (I.R.C. § 6103(k)(6))—may be a difficult task, and there may be disagreement on the correct answer. The government's objection here is to the summons enforcement court's retention of authority to make that determination in the midst of the IRS's investigation and prior to any disclosure. Even if the court ultimately agrees with the IRS and allows the disclosure, this procedure would seriously impede the investigation by causing delay and, in some cases, by requiring the IRS to give the targets a roadmap of the investigation in order to satisfy the court that the disclosure of the summoned material is authorized under Section 6103. Compare *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 750-751 (1984). Section 6103 provides fully adequate procedures for resolving questions of its applicability to particular disclosures, and for imposing appropriate remedies if the disclosure is held to be illegal, if and when such disclosures are made. The district court's order thus is an "unwarranted anticipatory interference" that "would disrupt the normal course" of the IRS's investigation (*O'Shea* v. *Littleton,* 414 U.S. 488, 500-501 (1974)), and it cannot be justified merely by the possibility that the IRS might in the future make a disclosure that the court would find to be violative of Section 6103.

2. a. Respondents' efforts (Br. 26-34) to characterize the restriction on enforcement of the summons in this case as a "protective order" of the sort routinely entered by

district courts to protect confidential commercial information are unavailing. First, protective orders imposed in discovery proceedings are based on authority specifically "conferred by Rule 26(c)" of the Federal Rules of Civil Procedure to limit discovery orders issued pursuant to Rule 26. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34 (1984). The summoned material here is requested under the IRS's statutory summons authority to aid in its tax collection function, and therefore Rule 26(c) does not govern its request.[1]

It is true that courts have inherent equitable power to prevent abuse of their process (see *Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 35; *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-146 (1888)), but that power does not justify the restriction imposed here. A court has the power to prevent a litigant from invoking its process through a pretext to obtain material for a purpose unrelated to the litigation and the justification for the court's order. There is no occasion for a court to invoke such an inherent power in the summons enforcement context, however, because the rules governing summons enforcement require the court to deny enforcement in such circumstances. In *United States* v. *Powell*, 379 U.S. 48, 58 (1964), this Court made clear that a summons is not to be enforced if it would be an abuse of process, such as "if the summons had been issued for an improper purpose." But it is no abuse of the court's process to seek enforcement of a summons for material relevant to a legitimate tax investigation. Even if the material

[1] Moreover, even if it could otherwise be argued that the Federal Rules authorize the type of restriction imposed by the district court here, this Court has pointed out that the Federal Rules of Civil Procedure do not apply "inflexibl[y]" to a summons enforcement action and should not be applied "to impair a summary enforcement proceeding so long as the rights of the party summoned are protected." *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971).

ultimately is used in a way that is unlawful, that is a distinct problem that does not reflect abuse of the court's process in obtaining the material for a legitimate purpose.[2]

Moreover, an order enforcing an IRS summons bears little resemblance to a discovery order in civil litigation, and therefore the restriction placed by the district court here upon the IRS's investigatory authority cannot reasonably be analogized to a "protective order." First, the proceedings are quite different. A protective order restricting the use of a discovered material is entered in a proceeding to adjudicate a particular case or controversy—one over which the district court exercises full authority, especially with respect to the discovery process. The only reason that discovery is granted at all is "for the sole purpose of assisting in the preparation and trial, or the settlement of, litigated disputes" (*Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 34). The court's power to restrict that discovery by the

[2] Respondents describe (Br. 26-27, 35-36) the allegations they made to the district court to try to show that the summons in this case was issued for the unlawful purpose of discovering evidence for use in the government's civil litigation with the Church, and they intimate that the district court credited these allegations and therefore imposed the restriction on the use of the summoned material to forestall expected "imminent violations of § 6103" (Resp. Br. 36). The court, however, did not credit respondents' allegations, and it did not find that the government was likely to violate Section 6103. On the contrary, the court stated (J.A. 45-46): "There's not an iota of evidence that this summons is being prosecuted for any reason other than to gather information for the on-going investigation. • • • No indication that it's being used for a collateral purpose." Rather, the court appears to have imposed the restriction because it viewed it as a harmless way of defusing respondents' allegations that the material would be furnished unlawfully to other government agencies that were engaged in litigation with the Church. However well-intentioned the court may have been, its order exceeded its authority in the summons enforcement proceeding, and the procedural complications introduced by such an order are far from harmless to the IRS's investigative capabilities.

entry of protective orders is a manifestation of the "complete control that the court has over the discovery process." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2036, at 267 (1970).

By contrast, a summons is issued in aid of an IRS investigation. That investigatory power is a broad one that is not confined to a particular dispute pending before a court. Rather, an IRS summons is akin to a grand jury subpoena (see *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975)); the IRS " 'does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not' " (*United States* v. *Powell*, 379 U.S. at 57, quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). In contrast to an adjudication in which a discovery order is entered, the district court has no role to play in the conduct of such an investigation, and there is no comparable reason for it to enter protective orders. See *Dow Chemical Co.* v. *Allen*, 672 F.2d 1262, 1267-1268 (7th Cir. 1982); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1386 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). The court's authority is limited to that conferred upon it by Congress to enforce or not to enforce the summons (see I.R.C. §§ 7402(b) and 7604(a)). As this Court recently reiterated, "[s]o long as the IRS itself acts in good faith, as that term was explicated in *United States* v. *Powell*, 379 U.S. at 57-58, and complies with applicable statutes, it is entitled to enforcement of its summons" (*United States* v. *Stuart*, No. 87-1064 (Feb. 28, 1989), slip op. 15-16).

Indeed, the function of a protective order is fundamentally different from that of the restriction on the IRS entered in this case. A protective order defines the extent to which discovered material is confidential and then provides protection for that material, which could otherwise

freely be disseminated to the public. As this Court has explained, "[b]ecause of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)" (*Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 34). The Federal Rules of Civil Procedure "permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case" (C. Wright & A. Miller, *supra*, § 2036, at 268). In other words, the liberal discovery rules themselves place almost no restrictions on the litigants' access to documents and do not protect their confidentiality; rather, they leave that protection to the "very wide discretion" (*id.* at § 2043, at 305) of the district court. This approach fully accords with the long-established principle that, when it is necessary to reveal confidential information in the course of particular litigation, "it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made" (*E.I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100, 103 (1917)).

When a court is requested to order the production of material in response to an IRS summons, its role is markedly different. The court has no discretion, nor any need, to identify any of the material produced as confidential. Section 6103 already establishes the confidentiality of the summoned material and defines the scope of its protection, which the district court has no discretion to alter.[1]

[1] That the district court in this case did not purport to alter the substantive confidentiality rules of Section 6103 does not make defensible its order creating a new and intrusive procedure for enforcing those rules. On the contrary, the fact that Section 6103 already prohibits the conduct at which the district court's order assertedly was targeted eliminates any enforcement justification for the order and therefore renders its deleterious effects on the IRS's investigative functions all the more improper.

Thus, unlike a protective order, the restriction imposed in this case does not serve the purpose of safeguarding a litigant from a harmful disclosure that would be permitted in the absence of the protective order; the order in this case is simply another means of enforcing the protection already provided by Section 6103—one that invites " 'protracted litigation' " that would undermine the congressional mandate that " 'summons enforcement proceedings should be summary in nature' " (*United States* v. *Stuart*, slip op. 15, quoting 1 S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982)). In sum, the purposes served by a protective order in the civil discovery context have no application in a summons enforcement proceeding.

b. There is similarly no force to respondents' attempt (Br. 32-34) to support its position by reference to cases involving administrative subpoenas. Indeed, this Court's decision in *FCC* v. *Schreiber*, 381 U.S. 279 (1965), undermines, rather than supports, the district court's restriction here on the use of summoned material. This Court in *Schreiber* harshly criticized the district court's order preventing the Commission from disclosing all subpoenaed information without prior approval of the court (*id.* at 295-300), and it ordered the district court "to enforce the Commission's orders and subpoena without qualification" (*id.* at 300). The Court noted that the district court's order usurped the Commission's authority to determine whether the documents should be disclosed (*id.* at 296) and that it could hamper the Commission's investigation by "den[ying] the benefit of other evidence stimulated by disclosure" (*id.* at 297). Moreover, the question in *Schreiber* was whether certain material should be accorded confidential treatment. That is not an issue in the summons enforcement context because *all* of the summoned material is already accorded confidential treatment

under Section 6103. Thus, *Schreiber* offers no support whatsoever for respondents' position.

The lower court cases cited by respondents similarly provide no support for their submission. *FTC* v. *Lonning*, 539 F.2d 202 (D.C. Cir. 1976), on which respondents primarily rely (see Br. 33), involved an adjudicatory proceeding before the agency, not an investigation. See also *Dow Chemical Co.* v. *Allen, supra.* The issue in *Lonning* was the company's objection to the alleged inadequacy of the confidentiality protections afforded by the agency; the court of appeals found those protections to be adequate and therefore it agreed with the district court that no protective order should be imposed. See 539 F.2d at 210-211. In the summons enforcement context, the substance of the confidentiality protections for the summoned material is furnished by Section 6103, and respondents cannot and do not suggest that that protection is inadequate. As in *Lonning*, therefore, since the substance of the confidentiality protection already afforded is adequate, it is not appropriate for the court to enter a protective order.

The other cases relied upon by respondents are directly contrary to their submission. *FTC* v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977), closely follows this Court's decision in *Schreiber*. The en banc court of appeals there rejected an order requiring that the agency's release of subpoenaed documents first be cleared with the court, criticizing the order as "plac[ing] the court in a position of supervision and control over the Commission in the exercise of its statutory duties" (555 F.2d at 884). Instead, the court held that the determination of confidentiality in the first instance lay with the agency, not with the court (*id.* at 883-884 & n.62). The court concluded that the district court's order "effectively blocked legitimate avenues of the FTC's inquiry" and "cannot be

reconciled with the narrow ambit * * * of a court asked to enforce an agency's investigative subpoena" (*id.* at 885).

In *SEC* v. *Dresser Industries, Inc., supra,* the en banc court of appeals rejected an attempt to restrict the SEC's authority to release to another government agency documents obtained pursuant to an administrative subpoena. The court stated that the company was "obligated under the securities laws to provide documents to the SEC in obedience to a lawful subpoena" and that its confidentiality rights were "the product solely of the laws governing the SEC" (628 F.2d at 1383). The court subsequently concluded that "the investigation is in good faith * * * [and] [t]here is, therefore, no reason to impose a protective order" (*id.* at 1387). The court added that the imposition of a " 'prophylactic' rule against cooperation between the agencies" would operate "to the detriment of securities law enforcement" (*ibid.*).

To the extent that respondents rely upon the fact that the agencies in those cases agreed to give the companies involved prior notice before disclosing arguably confidential information (see Br. 33 n.28), we note that the notice provisions were adopted voluntarily by the agencies, not imposed pursuant to some "inherent power" of the cou t. See *SEC* v. *Dresser Industries, Inc.*, 628 F.2d at 1389; *FTC* v. *Texaco, Inc.*, 555 F.2d at 884 n.64. Moreover, as we have explained, those proceedings concerned disputes over whether particular documents should be treated as confidential. Here, by contrast, it is agreed that Section 6103 provides confidentiality protection for the summoned material, and the district court's restriction serves only to introduce an additional pre-disclosure procedure for enforcing that protection.

3. Respondents also err in arguing (Br. 43-48) that the restriction on the IRS's use of summoned material imposed in this case is authorized by the prohibition on

disclosure of tax return information contained in Section 6103. As we explained in our opening brief (at 32-37), it is undisputed that Section 6103 restricts the dissemination or disclosure of return information in the hands of the IRS, including information obtained pursuant to a summons. But Section 6103 contains its own enforcement scheme, and it does not authorize conditioning enforcement of a summons upon monitoring by the summons enforcement court of disclosures of the summoned material. Indeed, such a role for the summons enforcement court would subject summoned material to a pre-disclosure proceeding that was not contemplated by Congress for any other type of return information.

Respondents argue that because Section 6103 does not explicitly proscribe pre-disclosure relief for a possible violation, a blanket requirement of pre-disclosure approval by the summons enforcement court would implement the intent of Congress. This argument, too, is erroneous. First, the authority cited by respondents in fact suggests that a taxpayer cannot bring suit to enjoin a proposed disclosure on the ground that it might violate Section 6103. In *Kemlon Products & Development Co.* v. *United States,* 638 F.2d 1315 (5th Cir.), cert. denied, 454 U.S. 863 (1981) (see Resp. Br. 47), the court of appeals held that such a suit was barred by the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). Like respondents (see Br. 38 n.34), the taxpayers there argued that the Act did not apply because the proposed disclosure would not be in furtherance of the collection of taxes. In rejecting that contention, the court of appeals held that the IRS's contention that the disclosure was authorized under Section 6103(k)(6) sufficed to bring the Anti-Injunction Act into play. That rationale is equally applicable to this case (see point 1, *supra*).[4]

[4] *Tierney* v. *Schweiker,* 718 F.2d 449, 456-457 (D.C. Cir. 1983), which respondents also cite (Br. 47), was a declaratory judgment ac-

In any event, it is undeniable that Congress did not contemplate or facilitate, as part of the enforcement scheme of Section 6103, suits to enjoin IRS disclosures on the ground that they would violate the statute's protections. Such an action seeking an injunction could be commenced only upon the fortuity of the taxpayer's learning that an IRS disclosure was imminent. In contrast to Section 6110(f) of the Code, where Congress established a notice requirement and provided for a pre-disclosure remedy (see U.S. Br. 35), Section 6103 does not require or otherwise envision that a taxpayer will receive notice of a proposed disclosure. Thus, it cannot be said that the conditional enforcement order imposed by the district court here implements congressional intent in enacting Section 6103. Certainly, Section 6103 does not provide the sort of "unambiguous directions from Congress" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984)), that could justify so substantial a procedural restriction upon the summons power.

Essentially, respondents argue that conditional enforcement orders are necessary because otherwise the IRS can be expected to violate Section 6103 in the course of using the summoned material. But courts are not empowered to enter orders requiring persons to obey the law in the absence of evidence that violations are otherwise likely to occur. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Moreover, a party bears an exceptionally heavy burden in seeking to enjoin the activity of a government agency. See *Rizzo* v. *Goode*, 423 U.S. 362, 378-379 (1976). There is no justification for such an order here. As this Court has noted in the specific context of an administrative subpoena, "administrative agencies are entitled * * * to the presumption * * * that they will act properly and according to law" (*FCC* v. *Schreiber*, 381 U.S. at 296). Applying this principle in a situation similar to this case, the Second Circuit refused to deny enforcement of a summons or to place restrictions on the use of the summoned material despite allegations by the taxpayer that the information would be shared with the Justice Department in violation of Section 6103. *United States* v. *Chemical Bank*, 593 F.2d 451, 455-458 (2d Cir. 1979). The court there stated that "the judiciary does not anticipate that the Government will act unlawfully" (*id.* at 455) and observed that a presumption that improper disclosures would occur was further undermined in "view of the serious consequences of violation of the privacy of taxpayer records, which include criminal penalties" (*id.* at 457-458). Correspondingly here, the district court erred in attempting to augment the scheme established by Congress to enforce Section 6103 by transforming a summary enforcement proceeding into a vehicle for monitoring the IRS's use of summoned material.[5]

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tion that did not purport to recognize a court's inherent authority to enjoin the IRS from disclosing material lawfully in its possession.

[5] Respondents suggest (Br. 36 n.31, 49) that the Court may wish to remand the case for the entry of a narrower restriction barring the IRS from disclosing the summoned information to government attorneys involved in the civil ligitation with the Church that was the subject of respondents' allegations of bad faith in the district court. While we would not regard such a restriction as proper, for the reasons already stated, we note that it would be inappropriate in any event in light of the termination of the civil litigation in question. Both of the suits to which respondents adverted in the district court were dismissed within a few months of its decision, and those dismissals have long since become final. The district court hearing was held on April 29 and April 30, 1985. The Church's civil damage suit against the United States and various federal officials in the District of Columbia was dismissed on April 9, 1985, as a discovery sanction for the Church's refusal to produce L. Ron Hubbard for a deposition, and the dis-

4. a. As respondents state, it is well established that the crime-fraud exception can be invoked to defeat a claim that attorney-client communications are privileged only if "a prima facie case [is made] that the communications were made in the furtherance of a future or ongoing crime or fraud" (Resp. Br. 11). The court of appeals unequivocally held that this prima facie showing must be made by independent evidence, *i.e.*, without resort to the contents of the communications themselves. The en banc court, reaffirming its circuit precedent of *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972), stated that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a). Applying this rule, the court of appeals declined to consider any of the "nonindependent evidence" introduced—including a partial transcript of the tapes and the affidavit of an IRS agent who had already listened to the tapes (see U.S. Br. 4-5 & n.2); on that basis, the court of appeals concluded that the remaining evidence did not show the applicability of the crime-fraud exception and therefore held that the MCCS tapes were protected by the attorney-client privilege (see Pet. App. 23a-24a).

This Court granted certiorari to consider the correctness of the court of appeals' rule that the applicability of the crime-fraud exception must be proved by independent

missal was affirmed on appeal. *Founding Church of Scientology* v. *Webster*, complaint dismissed, No. 98-0107 (D.D.C. Apr. 9, 1985), aff'd, 802 F.2d 1448 (D.C. Cir. 1986), cert. denied, 108 S. Ct. 199 (1987). A similar suit in the Central District of California was dismissed as a discovery sanction on July 26, 1985, and appeals from that order were dismissed. *Church of Scientology* v. *Linberg*, complaint dismissed, No. 77-2564 (C.D. Cal. July 26, 1985), appeals dismissed, Nos. 85-6292 and 86-5535 (9th Cir. Apr. 22, 1988).

evidence. We explained in our opening brief (at 40-49) that there is no justification for such a rule, which marks a sharp departure from the usual treatment of privilege questions. Respondents, in turn, make no effort to defend the correctness of the court of appeals' rule. Indeed, respondents do not even address the question of the character of the evidence that may be used to defeat the claim of privilege. Instead, respondents discuss a different question—the threshold showing that must be made before a district court may undertake an in camera examination of attorney-client communications in order to to determine whether the documents are in furtherance of a crime or fraud (see Resp. Br. i, 12-25). As we noted in our opening brief (at 42 n.23), this issue was not addressed below and is not directly presented by this case. And respondents' argument does not provide an alternative basis for affirmance of the judgment below; on the contrary, application of the rule respondents appear to advance clearly would require reversal of the judgment below.

b. Respondents apparently contend that an independent evidence requirement applies, not in determining whether documents are privileged (as the court of appeals held), but rather at the preliminary stage of a two-step process. Before a court may review disputed documents in camera to determine whether the crime-fraud exception is applicable, respondents argue, "the opponent of the privilege should be required to produce evidence, independent of the communications themselves, to indicate that the privileged communications were in furtherance of a crime or fraud" (Resp. Br. 13).[6] Except for the "*some* in-

[6] This contention necessarily differs from the court of appeals' independent evidence requirement with respect to the quantum of independent evidence that must be introduced. The court of appeals requires that there be independent evidence sufficient to establish a

dependent evidence" limitation (*id.* at 14 (emphasis added)), respondents' two-step approach is not substantially different from that suggested by the government and generally applied by the courts—namely, the district court must decide in its discretion, based on the submission made by the opponent of the privilege, whether there is a sufficient basis for examining the contested documents in camera in order to decide whether the crime-fraud exception is applicable.[7] But respondents' proposed additional limitation is erroneous. Just as there is no reason for allowing documents to be shielded by the attorney-client

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prima facie case that the communications were in furtherance of a crime or fraud, *i.e.*, to defeat the claim of privilege. Respondents presumably (though they do not say) would require something less in order to justify in camera inspection; after all, if the independent evidence is sufficient to establish a prima facie case that would defeat the privilege, the second step becomes superfluous for there is no longer any need for an in camera inspection to determine whether the applicability of the crime-fraud exception has been shown.

[7] Despite the clear statements to the contrary in our reply at the petition stage (at 9 n.7) and our brief on the merits (at 42 n.23), respondents insist on mischaracterizing the government's position as one that *requires* the district court to conduct an in camera inspection "upon the mere assertion that the crime-fraud exception applies" (Resp. Br. 15; see also *id.* at 7, 12). We recognize that the district court has discretion to decline to conduct an in camera examination in some cases if it is not shown that the circumstances warrant such an inquiry. The issue in this case, however, is whether the district court is ever *permitted* to consider nonindependent evidence in making the crime-fraud determination. Since this case does not present the issue whether a district court abused its discretion in conducting an in camera review of documents, we have not endeavored to explore what "standard[s]" (cf. Resp. Br. 12) would be applicable to that exercise of discretion. We note that, other than the inexplicable requirement that some "independent evidence" be introduced, respondents also do not set forth any "standards" for measuring the showing that must be made before the district court is permitted to conduct in camera review.

privilege in the face of probative (albeit not "independent") evidence that the communications were in furtherance of crime or fraud (see U.S. Br. 40-49), there is similarly no reason for imposing an independent evidence restriction upon the district court's power to conduct in camera review.

The only justification offered by respondents for placing an "independent evidence" limitation on the submission to the district court is the assertion that "open and frank" attorney-client discussions will be chilled if in camera review can occur in the absence of some "independent evidence" of crime or fraud (see Resp. Br. 13). There is no basis, however, for such an assumption; the fear of exposure of privileged information to the court itself has never been regarded as an overriding concern in connection with other privilege questions for which the availability of in camera review is undisputed (see U.S. Br. 44-45).[8]

Moreover, respondents' suggested limitation goes well beyond its professed goal of protecting against exposure

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[8] There is no merit to respondents' contention (Br. 20) that *Clark* v. *United States*, 289 U.S. 1 (1933), supports an independent evidence rule. This court stated in *Clark* that the attorney-client privilege is not lost upon a mere charge of fraud, but rather there "must be '*prima facie* evidence that it has some foundation in fact' " (*id.* at 15 (quoting *O'Rourke* v. *Darbishire*, [1920] A.C. 581, 604 (H.L. (E.)))). *Clark* does not suggest, however, that the evidence of fraud must be independent of the communications themselves. As discussed in our opening brief (at 46) and reflected even in the cases cited by respondents (see, *e.g.*, Resp. Br. 21 n.14), the practice in the federal courts embodies the understanding that the contents of the communications themselves can be considered in determining the applicability of the crime-fraud exception. And two courts of appeals have made this explicit. *In re Antitrust Grand Jury*, 805 F.2d 155, 168 ("*in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made"); *In re Berkley & Co.*, 629 F.2d

of confidential communications to the court when there is insufficient basis for in camera review. Respondents' position would deny probative, unprivileged evidence to the factfinder even when in camera inspection is not involved. In this case, for example, there was ample evidence that the crime-fraud exception was applicable, without the need for in camera inspection of the contested documents. Because the MCCS tapes had inadvertently been released by respondents (see Pet. App. 21a) and examined by other persons, the court had before it affidavits attesting to the contents of the tapes. Respondents suggest no justification for preventing the court from considering this highly probative evidence—even in making the preliminary determination whether to examine the tapes in camera—simply because it is not "independent evidence." The inevitable result of such a rule would be that the court in some cases would have to withhold relevant evidence from the factfinder even though the court would know (from nonindependent evidence) that the evidence is not privileged.[9] There is no reason to require that perverse outcome.

548, 553 n.9 (8th Cir. 1980) (expressly rejecting *Shewfelt*). We note that respondents are correct in stating (Br. 21 n.13) that the district court in *Antitrust Grand Jury* had ordered production of the contested documents; we inadvertently erred in stating (Br. 45) that the court of appeals had reversed a district court order upholding the claim of privilege. The language quoted from the court of appeals' opinion, however, still constitutes an emphatic rejection of any independent evidence requirement.

[9] Indeed, respondents presumably would argue that, even if a district court had examined documents that self-evidently fell within the crime-fraud exception, the court of appeals could hold the documents to be privileged on the ground that there had been insufficient "independent evidence" to justify the in camera examination.

In any event, respondents' proposed independent evidence rule provides no basis for affirmance of the judgment below. Applying *Shewfelt*, the court of appeals considered only whether there was sufficient independent evidence to establish a prima facie case that would defeat the privilege; it did not consider whether there was some lesser quantum of independent evidence that would support in camera review of the tapes. Indeed, it is undeniable that, in addition to the affidavits and partial transcripts, there was "some independent evidence" (Resp. Br. 14) here—characterized by the court of appeals as "not altogether insubstantial" (Pet. App. 24a)—that the communications on the tapes were in furtherance of crime or fraud. Thus, it would appear that, under the test suggested by respondents, the district court should have reviewed the tapes in camera to determine whether the crime-fraud exception applies. At all events, the judgment below that the tapes are privileged because the independent evidence is "not sufficient to make out the requisite prima facie showing" (*ibid.*) for invocation of the crime-fraud exception cannot stand even under respondents' submission.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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